Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

ROBERT D. RUFENACHT and ROBERT W. LEWIS d/b/a R & L CATTLE COMPANY,

Petitioners,

v.

IOWA BEEF PROCESSORS, INC.,

Respondent,

and

PROCHEMCO CATTLE PARTNERS, LTD. and PROCHEMCO, INC.,

Petitioners,

v.

IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit misapplied the doctrine of offensive collateral estoppel in conflict with this court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979).

2. Whether the Fifth Circuit departed from the accepted and usual course for invocation of collateral estoppel by ignoring the necessary inference rule.

PARTIES IN COURT BELOW

Robert D. Rufenacht and Robert W. Lewis d/b/a R & L Cattle Company, Prochemco Cattle Partners, Ltd., and Prochemco, Inc.* were consolidated plaintiff-appellants below. Iowa Beef Processors, Inc. was the defendant-appellee below.

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* The name of PROCHEMCO, INC. has been changed to PROCOR, INC. PROCOR, INC. is a wholly owned subsidiary of AZL Resources, Inc. The other affiliates and subsidiaries of AZL Resources, Inc. include: Hereford Feed Yards, Inc., Mid-America Feed Yards (Ohiowa, Nebraska), AZL Cattle Co., Hughes and Ganz Cattle Co., AZL Ranches, Inc., Farmhand, Inc., The Baca Grande Corporation, The Angel Fire Corporation, Texas Beef Feed Yards, Inc., AZ Co. Properties, Inc., Solar Petroleum, Inc., Murray-Carver, Inc., AZ Co. Capitol Corp., Breckenridge Nordic Village Corporation, Rechem, Inc., Texas Beef Producers, Inc., Heaton Feed Yards, Inc., Hereford Cattle Co.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, 656 F.2d 198 (5th Cir. 1981) appears as Appendix 1 hereto.

The memorandum opinion of District Judge Mary Lou Robinson of the United States District Court for the Northern District of Texas, Amarillo Division, 492 F.Supp. 877 (N.D. Tex. 1980) appears as Appendix 2 hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The basis for jurisdiction in the Federal District Court was diversity of citizenship. Two cases involving different plaintiffs, but the same defendant, were consolidated for trial. The cases remained in that posture through the Court of Appeals and in this petition before this Court. Plaintiffs in both cases sought recovery from Iowa Beef Processors, Inc. ("IBP") for losses sustained as the result of certain cattle transactions involving one James Louie Heller ("Heller"). The basis of the claim against IBP was that Heller was acting as IBP's agent.

Background

Heller began buying cattle for IBP in 1964 or 1965. In 1968, having no salaried cattle buyer (IBP's most common method of cattle procurement) on the South Plains (Eastern New Mexico and the Panhandle of Texas), IBP entered into a course of dealing with Heller whereby IBP's head cattle buyer, Russell Walker, regularly purchased cattle from Heller. Walker provided Heller with information regarding the number, type, weight, price and delivery of the cattle to be purchased. Heller was paid by IBP for the dressed weight of the cattle. If requested, IBP would advance a portion of the estimated dress weight of the cattle after they were in IBP's possession. These advances were made by wire transfer from IBP's bank to Heller's bank. The cattle purchased for IBP were transported in special railroad cars leased by Heller. Late in 1973 and January, 1974

when the transactions involved herein took place, Heller was shipping as many as 500 head per day to IBP.

On January 29, 1974, Heller purchased 720 head of cattle from Robert D. Rufenacht and Robert W. Lewis, d/b/a R & L Cattle Company ("R & L"). On January 27, 1974, Heller purchased 137 head of cattle from Prochemco Cattle Partners, Ltd. ("Prochemco"). All of these cattle were shipped to and slaughtered by IBP. Both of the transactions followed the pattern discussed above.

Heller issued his own checks to R & L and Prochemco in payment for the cattle. However, because of Heller's financial collapse in February, 1974, these checks were not paid. Some limited recovery was made by R&L and Prochemco against Heller's Packers & Stockyards bond and his bankrupt estate. It is the outstanding balance that forms the basis of the claim.

Prior Litigation

Prior to the trial of this cause, two other cases were tried to juries in which allegations and claims were made against IBP that Heller was acting as IBP's agent in purchasing cattle.

The first of these cases, *Valley View Cattle Co.* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219 (5th Cir. 1977), *cert. denied* 434 U.S. 855 (1977) resulted in a jury verdict in plaintiff's favor. The second case, *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, 630 F.2d 250 (5th Cir. 1980) also resulted in a jury verdict in plaintiffs' favor. (Hereinafter *Valley View* and *Lubbock Feed Lots*).

The cattle transactions at issue in *Valley View* and *Lubbock Feed Lots* occurred on several dates in January and February, 1974. In fact, the *R & L* transaction occurred on the same day as the *Valley View* transaction and the

Prochemco transaction occurred on the same day as one of the transactions involved in *Lubbock Feed Lots*. All of these transactions followed the same pattern as discussed above.

Collateral Estoppel

At trial, R & L and Prochemco argued that by virtue of the result in *Valley View* and *Lubbock Feed Lots*, IBP was collaterally estopped from denying that Heller was its agent. Such "offensive" use of collateral estoppel was recognized by this Court in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). While recognizing *Parklane*, the District Court and the Fifth Circuit rejected this argument. However, the rejection was based on an overly restrictive and incorrect interpretation of the guidelines of *Parklane*.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Ignored And Thereby, In Contradiction Of Decisions Of This Court, Failed To Apply The Doctrine Of Collateral Estoppel To Necessarily Determined Issues.

The Fifth Circuit recognized that in *Valley View*, *Lubbock Feed Lots*, and this case, there were allegations that Heller had an agency relationship with IBP. It was also recognized that the transactions involved in all of the cases were similar in nature and close in time. Further, the Fifth Circuit acknowledged that "[T]he fact that Heller's actions were such as to allow him to be deemed an agent of IBP in some cases may serve as the basis of argument in support of the conclusion that he so acted in others." 656 F.2d at 203. In spite of this, the Fifth Circuit declined to apply collateral estoppel because the juries in *Valley View* and *Lubbock Feed Lots* "[W]ere asked to and did determine only Heller's status with regard to the particular transaction before them." 665 F.2d at 204. This reasoning ignores

that the verdicts and judgments in *Valley View* and *Lubbock Feed Lots* were necessarily based on the conclusion that Heller was the general agent of IBP. They were not based upon the specifics of the transactions at issue.

On appeal to the Fifth Circuit in *Valley View*, IBP argued that there was insufficient evidence from which an agency relationship could be inferred. In response, the Court stated:

> Therefore, we review the evidence tending to show the existence of agency, express or implied, bearing in mind the . . . details of the arrangements and dealings between IBP and Heller. 548 F.2d at 1222.

In its review of the evidence in support of agency, the Fifth Circuit did not consider any evidence relating to the particular transaction. The Court only viewed the evidence relating to the relationship between Heller and IBP.

Similarly, on appeal to the Fifth Circuit in *Lubbock Feed Lots*, IBP argued that the evidence adduced at trial was insufficient to support the jury's finding that Heller was the agent of IBP in the transactions at issue. In its review of the evidence tending to prove agency, the Fifth Circuit noted that "[T]he evidence shows a long and well-established relationship between Heller and IBP." 630 F.2d 270. The Court then went on to summarize the evidence. None of it related to the specifics of the transactions in question.

To further show that the verdict in *Lubbock Feed Lots* was based upon the general relationship between Heller and IBP is the fact that while there were two feedlots involved (Lubbock and Lockney) and a finding of agency as to each feedlot, there were six different purchases at Lubbock and four different purchases at Lockney on eight different days. If in fact the verdicts were based on the transactions at issue rather than the general relationship

between IBP and Heller, there should have been ten findings of agency.

Further, IBP argued that the feedlots did not have standing to sue because they were not the real parties in interest because the feedlots merely acted as agents or bailees for the owners of the cattle in question but were not the owners. The Fifth Circuit disagreed with IBP and found the feedlots to be real parties in interest within the purview of Fed. R. Civ. P. 17(a). If the individual transactions were the key to the conclusion of agency, not only should there have been ten verdicts but as many as ten different plaintiffs.

Finally to cast away any doubt that the verdict in *Lubbock Feed Lots* related to the relationship between Heller and IBP and not to the specific transactions, the Fifth Circuit made the following observation in explaining that it did not have to address the issue of apparent agency:

> Similarly, we need not address IBP's contention that the feedlots failed to exercise due diligence to ascertain Heller's true relationship with IBP. The feedlots' diligence in this regard may well have substantial impact upon their right to recover under a theory of apparent agency, but it has no readily apparent bearing on the question of actual agency. *The liability of a principal in these circumstances turns ultimately upon the objective existence of a consensual arrangement between the principal and his agent, and not upon what third parties believed, or learned, or failed to try to learn about that relationship.* 630 F.2d at 271, n. 24. (Emphasis added.)

This Court has itself recognized that collateral estoppel precludes litigation of issues actually litigated and necessary to the outcome of the first action. *Montana* v. *United States*, 440 U.S. 147, 153 (1979), *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). By failing to take

cognizance of issues necessarily determined, although not explicitly set forth by earlier verdicts, the Fifth Circuit, as well as the District Court, incorrectly applied the standard for collateral estoppel.

2. By Ignoring The Necessary Inferences From Earlier Decisions, The Fifth Circuit Misapplied *Parklane Hosiery* v. *Shore*.

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), this Court concluded that offensive use of collateral estoppel is appropriate when the plaintiff could not have easily joined the earlier action and when the application of collateral estoppel would not be unfair to the defendant. The Fifth Circuit, agreeing with the District Court, refused to apply collateral estoppel here offensively because of the erroneous conclusion that the issues were not identical and that it would be unfair to IBP. The notion of unfairness related to the inability of IBP to present evidence of the transactions at issue here in the trials of the earlier cases. As indicated above, this analysis is incorrect and results in an incorrect application of offensive collateral estoppel as outlined in *Parklane*.

By starting with the proposition that the issue determined in the two earlier cases, as well as the case at bar, was an agency relationship as to individual cattle sellers, the application of collateral estoppel was never considered on the issue that was actually litigated. That issue was the general agency relationship. In discussing the issues that were decided, the Fifth Circuit stated:

> In each of the lawsuits pertinent to our consideration, plaintiff made or makes the allegation that Heller had an agency relationship with IBP. However, each claim is referable to a separate and distinct cattle transaction. There is no doubt that the transactions involving Valley View Cattle Company, Lubbock Feed Lots,

> Prochemco Cattle Partners and R&L were similar in nature and close in time. But they were not identical. The fact that Heller acted in a given manner with regard to any given seller does not necessarily dictate that he acted in the selfsame manner with another. 656 F.2d at 203.

That this is an incorrect view of the issues is apparent from *Lubbock Feed Lots* where it was noted that IBP's liability turned on the objective existence of a consensual arrangement between IBP and Heller, not what third parties (cattle sellers) believed or knew about that relationship.

In support of the conclusion that collateral estoppel does not apply in this case the Fifth Circuit cited three cases to demonstrate identity of issues. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979): involved the legality of one proxy statement; *Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978): involved one shooting incident; *Bank of Heflin* v. *Landmark Inns of America*, 604 F.2d 354 (5th Cir. 1979): involved one guarantee. This was contrasted to the case in question where the issue was viewed as involving "[S]eparate albeit similar sales of cattle." 656 F.2d at 203, n. 2.

The error is that the actual issue upon which collateral estoppel was urged had nothing to do with the individual sales of cattle. The issue was the consensual arrangement between IBP and Heller which was determined in each case from one, and the same, set of circumstances. Each of the opinions of the Fifth Circuit bear out that the evidence on the arrangements between IBP and Heller was identical.

By starting the collateral estoppel analysis with the wrong issue, the Fifth Circuit incorrectly applied *Parklane*. Collateral estoppel was rejected by the District Court and the Fifth Circuit because "[T]he issues determined in those cases were not identical to the ones at bar and because

application would be unfair to defendant IBP." 656 F.2d at 202. Since the wrong issue was considered, the possible unfairness to IBP could not be correctly assessed. If the correct issue had been addressed, namely the consensual arrangement between Heller and IBP, none of the reasons *Parklane* outlined for rejecting collateral estoppel would be present.

3. The Fifth Circuit Departed From The Accepted Application Of The Doctrine Of Collateral Estoppel.

By failing to recognize that collateral estoppel applies to issues necessarily determined, the Fifth Circuit departed from the customary and accepted use of collateral estoppel. In *Parklane* v. *United States*, 440 U.S. 147 (1979), this Court determined that collateral estoppel is applicable where an issue has been actually and necessarily determined. In *Wheat* v. *Texas Land & Mortgage Co.*, 153 F.2d 926, 928 (5th Cir. 1945), *cert. denied*, 328 U.S 837 (1946), it was noted that a party is bound by a factual conclusion that was not expressly raised and decided if such conclusion "[W]as within the compass of the tendered issues. . . ."

The Fifth Circuit itself has recognized that a judgment acts as an estoppel not only as to particular rights or questions actually litigated and determined but also as to issues that "[W]ere necessarily involved in the conclusions there reached." *Peckham* v. *Family Loan Co.*, 196 F.2d 838, 841 (5th Cir. 1952). The Eighth Circuit has recognized that collateral estoppel applies to matters necessarily decided in an earlier suit even if there was no specific finding or reference thereto. *Nelson* v. *Swing-A-Way Manufacturing Co.*, 266 F.2d 184, 187 (8th Cir. 1959). Collateral estoppel has been held to be applicable to an issue that was "[D]ecided implicitly in the first suit. . . ." *Patrict* v. *South Central Bell Telephone Co.*, 641 F.2d 1192, 1199 (6th Cir. 1980). The

United States Court of Claims has also recognized that issues underlying and determining precise issues should not be relitigated. *Hoopla Valley Tribe* v. *United States*, 596 F.2d 435, 437 (Ct. Cl. 1979).

Unfortunately, in the case at bar, the Fifth Circuit failed to take cognizance of the well established principle that collateral estoppel applies not only to issues explicitly decided in the earlier suit but also to issues that were implicitly decided and were necessary to and underlying the specific decision.

In this case, the issue on which collateral estoppel was urged was the consensual arrangement between Heller and IBP. A determination that there was such a relation was necessary to the finding of agency in *Valley View* and *Lubbock Feed Lots* because the only evidence in either case on that issue related to the relationship between Heller and IBP.

The Fifth Circuit has failed to apply collateral estoppel to issues necessarily determined. This failure is out of the customary and accepted course of consideration given to collateral estoppel.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT

N. D. TEXAS,

AMARILLO DIVISION.

Robert D. RUFENACHT and Robert W. Lewis, d/b/a R & L Cattle Company, Plaintiffs,

v.

IOWA BEEF PROCESSORS, INC., Defendant.

PROCHEMCO CATTLE PARTNERS, LTD., and Prochemco, Inc., Plaintiffs,

v.

IOWA BEEF PROCESSORS, INC., Defendant.

Civ. A. Nos. CA-2-76-16, CA-2-76-33.

June 20, 1980.

MEMORANDUM OPINION

MARY LOU ROBINSON, District Judge.

In this diversity suit, R & L Cattle Company and Prochemco Cattle Partners, Ltd.,[1] seek to recover losses incurred from separate cattle transactions involving James Louie Heller and Iowa Beef Processors (IBP). In each transaction, Heller purchased cattle from a plaintiff with his personal checks, took delivery, then sold and delivered

[1] Prochemco Cattle Partners, a limited partnership formed by Prochemco, Inc., to feed cattle as a tax-sheltered investment, was dissolved on July 14, 1974. Prochemco, as the general partner, absorbed all losses in excess of the limited partners' capital contributions.

the cattle to IBP. Heller's personal checks were subsequently dishonored or not paid. Plaintiffs then turned to IBP for payment, which IBP refused. This suit followed, with plaintiffs advancing four theories of recovery against IBP: (1) agency; (2) apparent authority; (3) conversion; and (4) collateral estoppel.

I

FACTS

Louie Heller began dealing with IBP through its head cattle buyer, Russell Walker, in 1964 or 1965. Walker testified that Heller approached him about order buying cattle for, or in the alternative selling cattle to, IBP. Walker refused Heller's offer to order buy cattle, but did begin purchasing quantities of cattle from him.

In 1968, Heller registered with the Packers & Stockyards Administration of the U.S. Department of Agriculture and posted the requisite cash bond as security for the payment of the cattle which he bought. Each year thereafter Heller filed annual reports of his operations with the Administration.

Also in 1968, IBP, having no salaried cattle buyer on the South Plains[2] where Heller operated, entered into a course of dealing with Heller whereby Russell Walker regularly offered to purchase cattle from him. Walker provided information concerning the maximum number of cattle of the type and weights desired by IBP, the price IBP would pay per pound for dressed beef, the date the cattle were to be delivered and the length of time the offer was to remain open. Heller usually accepted all or a portion of the offer, either at that time or at a later time before the offer lapsed.

[2] The area designated as the "South Plains" refers generally to Eastern New Mexico and the Panhandle of Texas.

Heller bought cattle on a live weight basis. He paid for the cattle with his personal checks. He normally dealt with the custom feed yard manager, or in some instances directly with the owner of the cattle on feed. Once an agreement was reached, Heller had ten days to take delivery or the cattle would be placed back on feed for his account.

Heller sold cattle to IBP on a dressed weight basis. Once the dressed weight was determined, IBP paid Heller by check. If requested IBP would advance Heller a portion of the estimated dressed weight of the cattle after they were in its possession. The partial payments were made by wire transfer from IBP's bank to Heller's bank.

The cattle which Heller sold to IBP were ordinarily transported by railcars leased by Heller and loaded at special sidings located in Amarillo and at the Hereford Feed Yard. Heller paid all the freight charges stemming from these shipments and bore the risk of loss resulting from the death of the cattle prior to delivery.

Heller bought cattle from areas other than the South Plains and sold to packers other than IBP. During the period from approximately 1964 to 1974, Heller bought cattle in Illinois, Iowa, Missouri, New Mexico, Oklahoma, and Texas. He sold cattle to Arizona Beef Company, Armour, Cleveland Livestock, Constantino Package Company, IBP, Randell Loveless, Missouri Beef Packers and James Yontz.

The R & L Cattle Company Transaction

On January 29, 1974, Louie Heller agreed to buy 720 head of cattle owned by R & L Cattle Company and on feed at United Beef Producers' feed yard near Hereford, Texas. The sale was approved by both Rufenacht and Lewis, partners in R & L Cattle Company.

Heller took delivery of the cattle on four separate days beginning on January 30, 1974, and concluding on February 8, 1974. On each occasion, United Beef Producers prepared an invoice showing Heller as the buyer and R & L Cattle Company as the owner. No reference was made to IBP.

Heller had the cattle transported by truck from the feed yard to a railroad siding, where the cattle were loaded onto railcars and shipped to IBP at Emporia. Upon receiving each of the first three shipments, IBP wired a partial payment to Heller's bank. Once IBP determined the dressed weight of the cattle in each shipment, checks for the balance of the purchase price were forwarded to Heller's account. No partial payment was transmitted on the fourth shipment of cattle, but IBP did make the full payment to Heller's trustee in bankruptcy.

It is stipulated that both United Beef Producers and R & L Cattle Company expected Heller to pay for the cattle with his personal checks. When no checks were received after Heller took delivery of the final shipment of cattle, Lewis asked the feed yard manager to investigate. After the manager met with Heller, payment for the first two shipments of cattle was received on February 9, 1974, in the form of two checks payable to United Beef Producers.

On Monday morning, February 11, 1974, at the feed yard manager's request Heller voided the two checks payable to United Beef Producers and reissued them in the names of the owners. Heller also issued checks for the last two deliveries of cattle. These four checks, which the manager transmitted to R & L Cattle Company, were not paid.

On February 19, 1974, certain of Heller's feed yard creditors filed an involuntary petition in bankruptcy. Heller consented to adjudication and was later adjudged bankrupt (BK 2-74-9).

R & L Cattle Company thereafter filed claims against Heller's Packers & Stockyards bond and his bankrupt estate. R & L Cattle Company recovered $20,434.90 and $99,358.12 from the respective claims.

R & L Cattle Company seeks to recover from IBP the balance of approximately $240,000 owing on the cattle sold to Heller.

The Prochemco Cattle Partners' Transaction

Shortly before Sunday, January 27, 1974, Louie Heller purchased 137 head of cattle owned by Prochemco Cattle Partners. These cattle were on feed at Prochemco's Hereford Feed Yard, which was managed by Richard Crider. In negotiating this transaction with Crider, Heller did not represent that he was acting on behalf of IBP.

Heller took delivery of the cattle on Sunday, January 27, 1974, at which time the cattle were weighed, the aggregate purchase price of $74,758.32 was determined, and a regular invoice prepared by feed yard personnel. The invoice and feed yard scale tickets were the only documents issued in connection with the sale and delivery of the cattle. The invoice showed Prochemco Cattle Partners as the seller and Louie Heller as the buyer. The only mention of IBP was in the "Remarks" section of the invoice, which contained a notation that the cattle had been "shipped to IBP at Emporia, Kan., via the railroad." This was known because the cattle were loaded directly on Heller's railcars at the Hereford Feed Yard's siding.

Heller combined the 137 head of cattle from Prochemco Cattle Partners with 104 head of cattle from two other owners at different feed yards. He then shipped the cattle in two railcars to IBP at Emporia. They arrived and were killed on Monday, January 28, 1974.

Upon receiving the cattle, IBP wired a $55,000 partial payment for each carload of cattle to Heller's bank at Peoria, Illinois. On the following day, IBP mailed two checks to Heller's bank for the balance due, computed on the dressed weight of the cattle. The checks were for $10,271.65 and $9,777.73. IBP's checks were deposited in Heller's account on January 31, 1974.

The invoice directed Heller to mail his check for the cattle to Prochemco's Amarillo office. When Heller's check did not arrive by Friday, February 8, 1974, one of Prochemco's clerks called the feed yard to have Crider follow upon the matter. Heller's check was subsequently received by Prochemco and deposited on February 19, 1974. It was returned unpaid on February 28, 1974.

In April, Prochemco Cattle Partners filed a claim against Heller's Packers & Stockyards bond and also filed a proof of claim in the bankruptcy proceedings. Prochemco Cattle Partners thereafter recovered $4,245.09 and $16,948.80 on the respective claims.

This suit was instituted to recover from IBP the balance of approximately $53,000 owing on the cattle which plaintiff sold to Heller.

II

AGENCY

Plaintiffs allege that Heller acted as the agent of IBP in purchasing the cattle in question. Plaintiffs specifically contend that Heller was an order buyer for IBP, i.e., a person buying cattle on the specific order of a packing firm and being compensated on a commission basis. IBP denies these allegations and claims Heller acted as a cattle dealer, purchasing cattle on his own account in hope he could later resell them for a profit.

The term "agency" denotes the legal relationship, created by express or implied agreement or by operation of law, whereby the agent is authorized to act for the principal, subject to the principal's control. *See Tarver, Steele & Co., Inc.* v. *Pendleton Gin Co.*, 25 S.W.2d 156, 158 (Tex.Civ.App. —Eastland 1930, no writ); *Harkins* v. *Murphy & Bolanz*, 51 Tex.Civ.App. 568, 112 S.W. 136, 137 (Tex.Civ.App. 1908, writ dism'd)

Texas has adopted Section 14 K of the Restatement (Second) of Agency (1957), which provides that:

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it agreed that he is to act primarily for the benefit of the other and not for himself.

American Employers Insurance Co. v. *Kilgore*, 412 S.W.2d 67, 69 (Tex.Civ.App.—Amarillo 1967, writ ref'd n.r.e.); *Valley View Cattle Company* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1221 (5th Cir.), *cert denied*, 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977). The Comment to Section 14 K states:

> • • • Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, and not acting as agent for, the other are: (1) that he is to receive a fixed price for the property irrespective of the price paid by him. This is the most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.

Comment, Restatement (Second) of Agency § 14 K (1957).

The evidence shows that IBP paid Heller an agreed price per dressed carcass weight pound, irrespective of the live weight price which Heller paid for the cattle. Thus, Heller relied on his knowledge of the cattle industry to determine

the price he would pay for the live cattle, for he personally bore the risk of loss in the event the dressed price which IBP paid him was insufficient to cover the live weight purchase price.

In each of the transactions Heller acted in his own name and was issued invoices listing him as the buyer of the cattle. Plaintiffs also provided Heller with copies of the scale tickets involved in each transaction, which, together with the invoices, were the only indicia of title in this case.

Further, the evidence establishes that Heller operated an independent business which engaged in the buying and selling of cattle for a profit. This evidence, considered with that already reviewed by the Court and in context with the factors enumerated in the Comment to Section 14 K of the Restatement, indicates that Heller acted as a seller in his transactions with IBP rather than as an agent.

In addition, the evidence is generally inconsistent with the various witnesses' accounts of what constitutes an order buyer. According to these witnesses, an order buyer is restricted to a designated area by the packing firm, does not assume the risk of loss on a transaction, does not generally receive advances from the packing firm, and does not pay the freight charges stemming from transporting the cattle to the packer. Heller was not restricted to buying cattle from a designated area, but bought cattle in a number of states other than Texas and New Mexico. In each of the transactions in question, Heller bore the risk of loss, received advances from IBP, and paid the freight charges on the shipments to IBP.

The Court concludes that Heller was not the agent of IBP, but rather was an independent cattle buyer engaging in the business of buying and selling cattle for a profit at his own risk.

III

APPARENT AUTHORITY

Plaintiffs next contend that IBP vested Heller with the appearance of authority so as to make IBP liable for Heller's purchases of the cattle in question. IBP denies these allegations.

The doctrine of apparent authority is based on estoppel. An alleged principal, who engages in conduct which would lead a reasonably prudent person, using diligence and discretion, to suppose that the alleged agent has the authority he purports to exercise, is estoppel from denying such authority. *Rourke* v. *Garza,* 530 S.W.2d 794, 802 (Tex.1975), *quoting, Chastain* v. *Cooper & Reed,* 152 Tex. 322, 257 S.W.2d 422 (1953). Only the conduct of the alleged principal may charge him under this doctrine. *Southwest Title Insurance Company* v. *Northland Building Corporation,* 552 S.W.2d 425, 428 (Tex.1977). The doctrine will not apply unless the person dealing with the alleged agent is misled and acts to his prejudice by reason of the alleged principal's conduct. *Cox Dry Goods Co.* v. *Kellog,* 145 S.W.2d 675, 680 (Tex.Civ.App.—Waco 1940, writ ref'd); *First Texas Joint Stock Land Bank* v. *Holloway,* 77 S.W.2d 301, 302 (Tex.Civ. App.—Amarillo 1934, no writ).

IBP had no direct dealings with the feed yards on the South Plains concerning Louie Heller. It was generally known among feed yard personnel, however, that IBP did not have a regular salaried cattle buyer on the South Plains. It was also known that Heller regularly communicated with IBP, that he purchased large quantities of cattle, and that many of these cattle were shipped to IBP. These facts alone are inconclusive on the question of apparent authority.

Further, the evidence does not show that IBP acquiesced in conduct by Heller which would charge IBP with liability

by virtue of apparent authority. Heller did not represent to either Prochemco Cattle Partners or R & L Cattle Company that he was the agent of IBP. Heller acted in his own name and paid for the cattle with his personal checks. Both Prochemco Cattle Partners and R & L Cattle Company prepared invoices on the sales in question which named Heller as the buyer. R & L Cattle Company stipulated that it expected Heller to pay for the cattle with his personal checks, as he had done in the past. Richard Crider, manager of the Hereford Feed Yard where the Prochemco Cattle Partners' cattle were sold, testified that:

Q. When you sold cattle to Louie Heller, who did you expect to pay for these cattle?

A. Well, the checks came from Louie Heller.

Q. Was he the person you expected to pay for them?

A. Right.

It is clear that Crider expected Heller to pay for the 137 head of cattle which were purchased from Prochemco Cattle Partners. Finally, Prochemco Cattle Partners and R & L Cattle Company each filed claims and had recoveries against Heller's Packers & Stockyards bond and his bankrupt estate.

The Court concludes that IBP is not liable to plaintiffs under the doctrine of apparent authority for the balance owing on the cattle purchased by Heller.

IV

CONVERSION

Plaintiffs allege that IBP wrongfully converted the cattle in question by purchasing them with the knowledge that Heller did not have good title. IBP denies the allegation and maintains that it is a good faith purchaser for value.

Section 2.403 of the Texas Business and Commerce Code provides, in part, that:

> (a) * * * A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> * * * * *
>
> (2) the delivery was in exchange for a check which is later dishonored.

Tex. Bus. & Comm. Code Ann. § 2.403(a)(2) (1968).

In the transactions in question, Heller bought cattle from plaintiffs with his personal checks. Heller took delivery of the cattle, was issued an invoice by plaintiff, and was given a copy of the scale tickets. The invoices and scale tickets constituted the only indicia of title issued in this suit.

Heller sold and delivered the cattle to IBP. IBP paid Heller for the cattle. IBP purchased the cattle without knowledge that Heller had acquired possession of the cattle by giving worthless checks as payment. IBP acted without knowledge of any irregularity in the method or means by which Heller acquired possession of the livestock. IBP did not know that Prochemco Cattle Partners or R & L Cattle Company had an interest in the cattle.

The Court concludes that IBP was a good faith purchaser for value of the cattle and that it is not liable under the law of conversion.

V

COLLATERAL ESTOPPEL

Plaintiffs seek to offensively assert the doctrine of collateral estoppel against IBP. Plaintiffs contend that IBP is barred from relitigating the theories of agency, apparent

authority and conversion because those theories have been determined adversely to IBP in *Valley View Cattle Company* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219 (5th Cir.), *cert. denied*, 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977), and in *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, CA 5—76—6 (N.D.Tex.1978), *appeal docketed*, No. 78—2271 (5th Cir. June 14, 1978).

The doctrine of collateral estoppel bars the relitigation in a subsequent lawsuit of fact issues actually litigated and essential to a prior judgment. *Benson* v. *Wanda Petorleum Company*, 468 S.W.2d 361, 362 (Tex.1971). Texas courts have traditionally applied this doctrine when: (1) the issues in the subsequent action are identical to the issues previously adjudicated and essential to a prior judgment; (2) the prior judgment is final; and (3) the parties in the subsequent action are the same or in privity with the parties to the prior action. *See, Swilley* v. *McCain*, 374 S.W.2d 871 (Tex.1964); *Kirby Lumber Corp.* v. *Southern Lumber Co.*, 145 Tex. 151, 196 S.W.2d 387, 388-89 (1946). Texas courts have recently indicated, however, that the doctrine may be applied where the traditional requirement of identity of parties is not satisfied. *See, Benson* v. *Wanda Petroleum Company, supra; Olivarez* v. *Broadway Hardware, Inc.*, 564 S.W.2d 195 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e); *Hardy* v. *Fleming*, 553 S.W.2d 790 (Tex.Civ. App.—El Paso 1977, writ ref'd n.r.e). *See also, Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales* v. *Jernigan*, 410 F.2d 718 (5th Cir. 1969).

The United States Supreme Court, in *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), held that a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues in a subsequent legal action brought against it by a new party. In so holding, the Court concluded that:

> * * * the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Shore, supra, at 331, 99 S.Ct. at 651-52.

The prior Valley View judgment

In *Valley View,* Louie Heller bought 259 head of cattle from Valley View Cattle Company. Heller sold and delivered the cattle to IBP at its Emporia plant. Valley View later received payment from Heller in the form of his personal check, which was dishonored upon presentment.

Valley View sued IBP to recover the value of the cattle sold to Heller alleging three theories against IBP, to-wit: (1) Heller acted as the agent of IBP in purchasing the cattle; (2) IBP vested Heller with apparent authority; and (3) IBP converted the cattle to its own use. The trial court submitted the theories to the jury on special interrogatories, which were all answered in favor of Valley View. Judgment was entered accordingly.

The *Valley View* court submitted the question of actual agency as follows:

> Do you find from a preponderance of the evidence that James Louie Heller was acting as the agent for Iowa Beef Processors *at the time of his purchase of the cattle in question* from Valley View Cattle Company? (emphasis added)

The jury affirmatively answered this question. The Fifth Circuit Court of Appeals affirmed.

An examination of the Fifth Circuit opinion in *Valley View* reveals that the basis of affirmance was not the existence of an express agreement of agency between IBP and Heller, but rather the presence of evidence from which a jury could imply an agency relationship. The court thus concluded that "there was sufficient evidence in support of the jury's finding that Heller purchased the cattle in question as the agent of IBP." *Valley View Cattle Company* v. *Iowa Beef Processors, Inc., supra,* at 1221.

Both the jury's answer to the special interrogatory on actual agency and the Fifth Circuit affirmance of that answer are limited to the transaction between Valley View Cattle Company and Louie Heller. Whether an agency relationship could also be implied in the case at bar has not been resolved by the *Valley View* finding. The Court concludes that the actual agency issue resolved in *Valley View* is not identical to the issue presented in this case.

The Court further finds that the issues submitted by the *Valley View* court on the theory of apparent authority are not identical to the issues presented in this case. An essential element of this theory of recovery is that plaintiff rely upon the apparent authority of the alleged agent to his prejudice. *See, Southwest Title Insurance Company* v. *Northland Building Corporation,* 552 S.W.2d 425, 428 (Tex. 1977). Neither Prochemco Cattle Partners nor R & L Cattle Company was a party, or in privity with a party, in the *Valley View* case. Thus, the jury finding that the conduct of Heller and IBP led Valley View to reasonably believe Heller was the agent to IBP is necessarily limited to that decision.

The *Valley View* court also submitted to the jury several issues referable to the theory of conversion. On appeal, the Fifth Circuit did not address these issues. The court simply

stated: "The evidence was sufficient to take the case to the jury on actual and implied authority, the jury has decided that, and there it must end. We need not discuss the other issues." Where an appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine. *See,* 1B Moore's Federal Practice ¶ 0.416[2] at 2232.

The Court is also of the opinion that the application of the doctrine of collateral estoppel to the present case would be unfair to the defendant. The *Valley View* record is not before the Court. Yet it is apparent from the Fifth Circuit opinion that the agency relationship found to exist in *Valley View* was implied from the circumstances surrounding that particular transaction. To apply the doctrine in the present suit would deprive defendant of the right to present evidence concerning the transactions now in question which would not have been admissible in the *Valley View* litigation.

The Court concludes that IBP is not barred by the prior *Valley View* judgment from litigating the theories of agency, apparent authority and conversion in the present suit.

The prior Lubbock Feed Lots judgment

In the *Lubbock Feed Lots* litigation, as in *Valley View* and in the present suit, Louie Heller purchased cattle with worthless checks. When payment could not be made by Heller, Lubbock Feed Lots sued IBP to recover the value of the cattle. Lubbock Feed Lots advanced the three theories which had been raised in *Valley View,* but the jury found for plaintiffs only on the issues of actual and apparent authority.

The Court, applying the same analysis used in the discussion of the *Valley View* judgment, finds that the actual

agency issue decided in *Lubbock Feed Lots* is not identical to the agency issue presented in the case at bar. The Court further finds that it would be unfair to defendant to apply the doctrine of collateral estoppel with regard to the actual agency issue. Finally, the apparent agency findings in *Lubbock Feed Lots* are necessarily limited to that decision.

The Court concludes that IBP is not barred by the *Lubbock Feed Lots* judgment from litigating the issues of agency and apparent authority in the present suit.

VI

CONCLUSION

Louie Heller did not act as the agent of IBP in purchasing the cattle in question. Heller was an independent cattle buyer who acted in his name, was invoiced in his name and personally accepted the risk of loss on each purchase of cattle and subsequent resell.

IBP did not vest Heller with the appearance of authority. Prochemco Cattle Partners and R & L Cattle Company each expected Heller to pay for the cattle which he purchased. When Heller's checks were dishonored, both plaintiffs filed claims and recovered against Heller's Packers & Stockyards bond and against his bankrupt estate. Only when these recoveries proved insufficient to satisfy Heller's entire obligation did plaintiffs institute suit against IBP.

IBP purchased the cattle in question from Heller as a good faith purchaser for value. Therefore. IBP is not liable under the law of conversion.

Finally, IBP is not collaterally estopped from litigating the theories of agency, apparent authority and conversion which have been presented by this suit.

Accordingly, the Court will enter judgment that plaintiffs take nothing from their actions against IBP.

APPENDIX 2

UNITED STATES COURT OF APPEALS
Fifth Circuit
Unit A

Robert D. RUFENACHT and Robert W. Lewis,
d/b/a R&L Cattle Company, Plaintiffs-Appellants,

v.

IOWA BEEF PROCESSORS, INC. Defendant-Appellee.

PROCHEMCO CATTLE PARTNERS, LTD.
and Prochemco, Inc., Plaintiffs-Appellants,

v.

IOWA BEEF PROCESSORS, INC., Defendant-Appellee.

No. 80-1818.

Sept. 17, 1981.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN and GARZA, Circuit Judges, and CHARLES SCHWARTZ, Jr.*, District Judge.

CHARLES SCHWARTZ, Jr., District Judge:

Plaintiffs in these consolidated diversity actions, Robert D. Rufenacht and Robert Lewis d/b/a R&L Cattle Company, Prochemco Cattle Partners, Ltd., and Prochemco, Inc., brought suit against defendant, Iowa Beef Processors, Inc., seeking recovery of losses sustained as the result

* District Judge of the Eastern District of Louisiana, sitting by designation.

of cattle transactions involving one James Louie Heller, alleged by plaintiffs to have been acting as agent of defendant. Following non-jury trial the District Court, 492 F.Supp. 877, rejected plaintiffs' claims, and they now appeal from that adverse ruling Appellants urge that the trial court erred in refusing to apply the doctrine of collateral estoppel with respect to the agency issue and in failing to find that Heller was defendant's agent in the subject transactions. Finding no error in the trial court's judgment, we affirm.

THE PARTIES

Prochemco, Inc. (Prochemco) was a corporation engaged in the cattle feeding business. Prochemco owned and operated (either directly or through wholly own subsidiaries) four feed yards including Hereford Feed Yards at Hereford, Texas. These feed yards were all predominantly "custom" feed yards which, as agent or bailee-for-hire, fed and marketed slaughter cattle owned by ranchers or investors in return for a fee based on the cost of feed consumed plus overhead and profit.

Prochemco Cattle Partners, Ltd. (Prochemco Cattle Partners) was one of several syndicated and publicly offered limited partnerships formed by Prochemco to feed cattle as a tax-sheltered investment. Prochemco was the general partner and managed the entire operation of the partnership which consisted of purchasing feeder cattle, placing them on feed at Prochemco's feed yards on the same terms as ordinary custom feeders, and marketing the finished cattle.

R&L Cattle Company (R&L) was a private cattle feeding partnership consisting of Robert L. Rufenacht and Robert Lewis which fed pens of cattle at various custom feed yards, sharing profits and losses equally. Rufenacht was an owner

and principal in the Chicago commodities brokerage firm of Rufenacht, Bromagen & Hertz (RB&H) which had a number of branch offices. Lewis was manager of RB&H's office at Larned, Kansas.

Iowa Beef Processors, Inc. (IBP) was a meat packer purchasing, slaughtering, processing and marketing beef. At all times pertinent the IBP plant closest to the Hereford, Texas cattle feeding area was at Emporia, Kansas almost 500 miles away.

James Louie Heller (Heller) was a cattle buyer whose status is at issue herein.

THE FACTS

Heller's dealings with IBP began in 1964 or 1965 when he contacted IBP's head cattle buyer, Russell Walker, about order buying cattle for IBP. Walker refused Heller's offer to buy, i.e., to purchase upon specific order of the packing firm with compensation on a commission basis. However, he indicated that he would buy from Heller at "dressed beef" prices, i.e., the price per pound after slaughter based upon the carcass weight.

In 1968 Heller registered with the Packers & Stockyards Administration of the United States Department of Agriculture and posted the requisite cash bond as security for the payment of the cattle that he bought.

Although IBP procured most of its cattle through salaried cattle buyers (covered by IBP's blanket Packers & Stockyards bond) and paid the seller with its own checks, IBP also bought cattle from independent dealers and through order buyers.

In 1968, IBP, having no salaried cattle buyer on the South Plains (Eastern New Mexico and the Panhandle of

Texas) where Heller operated, entered into a course of dealing with Heller whereby Russell Walker regularly offered to purchase cattle from him. Walker provided Heller with information concerning the maximum number of cattle of the type and weights desired by IBP, the price IBP would pay per pound for dressed beef, the date the cattle were to be delivered and the length of time the offer would remain open. Heller usually accepted all or a portion of the offer, either at that time or at a later time before the offer lapsed.

Heller bought cattle on a live weight basis. He paid for the cattle with his personal checks. He normally dealt with the custom feed yard manager, or in some instances directly with the owner of the cattle on feed. Once an agreement was reached, Heller had ten days to take delivery or the cattle would be placed back on feed for his account.

Heller sold cattle to IBP on a dressed weight basis. Once the dressed weight was determined, IBP paid Heller by check. If requested, IBP would advance Heller a portion of the estimated dressed weight of the cattle after they were in its possession. The partial payments were made by wire transfer from IBP's bank to Heller's bank.

The cattle which Heller sold to IBP were ordinarily transported by railcars leased by Heller and loaded at special sidings located at Amarillo and at the Hereford Feed Yard. Heller paid all freight charges stemming from these shipments and bore the risk of loss resulting from the death of cattle prior to delivery.

Heller was free to—and did—sell cattle to packers other than IBP at whatever prices he could negotiate. As time passed, the volume of cattle supplied by Heller to IBP increased until, in late 1973 and January, 1974, Heller was shipping as many of 500 head to Emporia on some days

On January 29, 1974, Heller agreed to buy 720 head of cattle owned by R&L and on feed at United Beef Producers' feed yard near Hereford, Texas. The sale was approved by R&L partners Rufenacht and Lewis.

Heller took delivery of the cattle on four separate days beginning on January 30, 1974 and concluding on February 8, 1974. On each occasion United Beef Producers prepared an invoice showing Heller as the buyer and R&L as the owner. No reference was made to IBP.

Heller had the cattle transported by truck from the feed yard to a railroad siding, where the cattle were loaded onto railcars and shipped to IBP at Emporia. Upon receiving each of the first three shipments, IBP wired partial payment to Heller's bank. Once IBP determined the dressed weight of the cattle in each shipment, checks were forwarded to Heller's account. With regard to the fourth shipment, IBP made no partial payment, but made payment in full to Heller's trustee in bankruptcy.

Both United Beef Producers and R&L expected Heller to pay for the cattle with his personal checks. When no checks were received after Heller took delivery of the final shipment of cattle Lewis of R&L asked the feed yard manager to investigate the matter. Following a meeting between the manager and Heller, payment for the first two shipments of cattle was received on February 9, 1974, in the form of two checks made payable to United Beef Producers.

On February 11, 1974, at the feed yard manager's request, Heller voided the two checks payable to United Beef Producers and reissued them in the names of the owners. Heller also issued checks for the last two deliveries of cattle. The feed lot manager transmitted these four checks to R&L, however, none were paid.

Shortly before Sunday, January 27, 1974, Heller purchased 137 head of cattle owned by Prochemco Cattle Partners. These cattle were on feed at Prochemco's Hereford Feed Yard. The transaction was negotiated between Heller and the feed yard manager Richard Crider. Heller did not represent to Crider that he was acting on behalf of IBP.

Heller took delivery of the cattle on January 27, at which time the cattle were weighed and a regular invoice prepared by the feed yard personnel reflecting the purchase price. The feed yard scale tickets and the invoice were the only documentation issued in connection with the sale and delivery of the cattle. The invoice showed Prochemco Cattle Partners as the seller and Heller as the buyer. IBP was mentioned in the "Remarks" section of the invoice wherein there was a notation that the cattle had been "shipped to IBP at Emporia, Kansas, via the railroad." This was known as the result of the fact that the cattle were loaded onto Heller's railcars at the feed yard siding.

The cattle purchased from Prochemco Cattle Partners arrived at Emporia on January 28 and were killed that date. Upon receiving the cattle IBP wired $55,000 partial payment for each of the two carloads of cattle which had been made up of the 137 head purchased from Prochemco Cattle Partners and 104 head from other owners. The following day IBP mailed two checks to Heller's bank for the balance due based upon the dressed weight of the cattle. The checks were for $10,271.65 and $9,777.73 and they were deposited into Heller's account on January 31, 1974.

The invoice from the feed yard directed Heller to mail his check for the cattle to Prochemco's Amarillo, Texas office. When no check had arrived from Heller by Friday, February 8, 1974, a Prochemco clerk called the Hereford Feed Yard to have Mr. Crider follow up on the matter.

Subsequently, Heller's check was received by Prochemco and deposited on February 19, 1974. It was returned unpaid on February 28, 1974.

On February 19, 1974, certain of Heller's feed yard creditors filed an involuntary petition in bankruptcy. Heller consented to adjudication and was later adjudged bankrupt.

Plaintiffs in these consolidated lawsuits thereafter filed claims against Heller's Packers & Stockyards bond and his bankrupt estate and recovered partial payment of their respective claims. These lawsuits were instituted seeking recovery of the balances still owing.

THE APPLICABILITY OF COLLATERAL ESTOPPEL

Heller's insolvency gave rise to other lawsuits by parties who, like Prochemco Cattle Partners and R&L, sold cattle to Heller which ultimately became the property of IBP. Two such cases were filed by Valley View Cattle Company and Lubbock Feed Lots, Inc. against IBP. They were tried to separate juries and resulted in verdicts for plaintiffs based upon the finding that, with respect to the transactions at issue therein, Heller had an agency relationship with IBP. Both cases were affirmed on appeal to this Court. *Valley View Cattle Co.* v. *Iowa Beef Processors,* 548 F.2d 1219 (5th Cir. 1977) *cert. den'd* 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977); *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors,* 630 F.2d 250 (5th Cir., 1980). (Hereinafter *Valley View* and *Lubbock Feed Lots*).

Appellants here take the position that the trial court erred in failing to hold that, by virtue of the result in *Valley View* and *Lubbock Feed Lots,* IBP was estopped from denying an agency relationship with Heller in the transactions forming the subject matter of these two lawsuits. We disagree.

Federal procedure governs the applicability of the doctrine of collateral estoppel in these diversity actions. *Stovall* v. *Price Waterhouse Co.*, 652 F.2d 537 (5th Cir., 1981); *Southern Pacific Transportation Co.* v. *Smith Material Corp.*, 616 F.2d 111 (5th Cir., 1980) *reh. den'd* 621 F.2d 440 (1980); *Johnson* v. *United States*, 576 F.2d 606 (5th Cir., 1978); *Willis* v. *Fournier*, 418 F.Supp. 265 (M.D.Ga., 1976) *aff'd without published opinion* 537 F.2d 1142 (5th Cir., 1976).

Applicability of collateral estoppel is conditioned upon three requirements: (1) that the issue to be concluded be identical to that involved in the prior action; (2) that in the prior action the issue was fully litigated; and (3) that the determination of the issue was necessary and essential to the resulting judgment in the prior action. *Johnson* v. *United States*, supra, at p. 615; *In the Matter of Merrill*, 594 F.2d 1064 (5th Cir., 1979).

The estoppel urged here is offensive collateral estoppel whereby a plaintiff seeks to estop a defendant from relitigating issues which a defendant previously litigated and lost against another plaintiff. Use of offensive collateral estoppel was approved in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). However, the decision as to the applicability of the doctrine is within the discretion of the trial judge who should not allow its use when to do so would be unfair to the defendant. *Parklane, supra.* As noted in *Johnson* v. *United States, supra:*

> ". . . the offensive use of collateral estoppel calls for the courts to use special care in examining the circumstances to ascertain that the defendant has in fact had a full and fair opportunity to litigate and that preclusion will not lead to unjust results. [citations omitted]" 576 F.2d at 614.

The Court below carefully analyzed *Valley View* and *Lubbock Feed Lots* and determined that collateral estoppel

was not applicable for the reason that the issues determined in those cases were not identical to the ones at bar and because application would be unfair to defendant IBP.[1] We find no error in such conclusion.

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[1] The Memorandum Opinion of the trial court states in pertinent part:

> An examination of the Fifth Circuit opinion in *Valley View* reveals that the basis of the affirmance was not the existence of an express agreement of agency between IBP and Heller, but rather the presence of evidence from which a jury could imply an agency relationship. The Court thus concluded that, "there was sufficient evidence in support of the jury's finding that Heller purchased the cattle in question as the agent of IBP." [citation omitted]
>
> Both the jury's answer to the special interrogatories on actual agency and the Fifth Circuit affirmance of that answer are limited to the transaction between Valley View Cattle Company and Louie Heller. Whether an agency relationship could also be implied in the case at bar has not been resolved by the *Valley View* finding. The Court concludes that the actual agency issue resolved in *Valley View* is not identical to the issue presented in this case.
>
> The Court further finds that the issues submitted by the *Valley View* court on the theory of apparent authority are not identical to the issues presented in this case. An essential element of this theory of recovery is that plaintiff rely upon the apparent authority of the alleged agent to his prejudice. *See, Southwest Title Insurance Company* v. *Northland Building Corporation*, 552 S.W.2d 425, 428 (Tex., 1977). Neither Prochemco Cattle Partners nor R & L Cattle Company was a party or in privity with a party, in the *Valley View* case. Thus, the jury finding that the conduct of Heller and IBP led Valley View to reasonably believe Heller was the agent of IBP is necessarily limited to that decision.
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> The Court is also of the opinion that the application of the doctrine of collateral estoppel to the present case would be unfair to the defendant. The *Valley View* record is not before the Court. Yet it is apparent from the Fifth Circuit opinion that the agency relationship found to exist in *Valley View* was

Collateral estoppel is appropriate only when the identical issue has been fully litigated in a prior case. In each of the lawsuits pertinent to our consideration, plaintiff made or makes the allegation that Heller had an agency relationship with ProP. However, each claim is referable to a separate and distinct cattle transaction. There is no doubt that the transactions involving Valley View Cattle Company, Lubbock Feed Lots, Prochemco Cattle Partners and R&L were similar in nature and close in time. But they were not identical.[2] The fact that Heller acted in a given manner

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implied from the circumstances surrounding that particular transaction. To apply the doctrine in the present suit would deprive defendant of the right to present evidence concerning the transactions now in question which would not have been admissible in the Valley View litigation.

* * * * *

The Court, applying the same analysis used in discussion of the *Valley View* judgment, finds that the actual agency issue decided in *Lubbock Feed Lots* is not identical to the agency issue presented in the case at bar. The Court further finds that it would be unfair to defendant to apply the doctrine of collateral estoppel with regard to the actual agency issue. Finally, the apparent agency findings in *Lubbock Feed Lots* are necessarily limited to that decision.

[2] Comparison of cases in which collateral estoppel has been held to apply with the instant ones serves to further illuminate the absence of an identity of issues. In *Parklane, supra* a single proxy statement was at issue. The statement has been held to be false and misleading in a prior action filed by the Securities and Exchange Commission. Thereafter, defendant was held estopped from relitigating the legality of the statement in a stockholder's class action challenging it. *Johnson* v. *United States, supra* was a suit by the widow of an individual killed in a shooting incident which allegedly arose out of the negligence of certain army personnel. There the United States was held estopped from denying negligence because it had previously been found in a suit by the widow of another individual killed in the same shooting. In *Bank of Heflin* v. *Landmark Inns of America*, 604 F.2d 354 (5th Cir., 1979) suit was

with regard to any given seller does not necessarily dictate that he acted in the selfsame manner with another. Certainly the fact that Heller's actions were such as to allow him to be deemed an agent of IBP in some cases may serve as the basis of argument in support of the conclusion that he so acted in others. However, the holdings in *Valley View* and *Lubbock Feed Lots* are not dispositive of Heller's status in the Prochemco Cattle Partners sale of on or before January 27, 1974, or in the R&L transaction of January 29, 1974. The juries in *Valley View* and *Lubbock Feed Lots* made no finding that during any given span of time Heller was acting exclusively as agent of IBP. Those juries were asked to and did determine only Heller's status with regard to the particular transaction before them. Our affirmances relate solely to the sufficiency of the evidence in support of the jury verdicts as to those two transactions. Prior to trial of these matters below no trier of fact had ever addressed the precise questions at issue herein. Collateral estoppel is unwarranted under the circumstances here present and application of the doctrine, as recognized by the trial court, would be unfair to defendant.

THE HOLDING OF THE TRIAL COURT

Findings of fact are not to be set aside unless clearly erroneous. F.R.C.P. 52(a). Review of the record in these

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filed by the plaintiff bank against a guarantor of a note who was held estopped from denying indebtedness under the guarantee because he had previously obtained judgment in his favor as against a third party for the same indebtedness subject of the guarantee, and had previously been held collaterally estopped from making such denial in a suit on the guarantee by another bank.

In each instance estoppel applies there is an actual identity of issues—the legality of one proxy statement, the negligence arising from one incident, the execution of one guarantee—as opposed to the cases at bar which involve separate albeit similar sales of cattle.

cases reveals the factual findings of the trial court to be amply supported by the evidence.

If findings of fact are not clearly erroneous, the only issue for determination on appeal is whether the legal conclusion drawn from those facts is correct. *Studiengesellschaft Kohle* v. *Eastman Kodak Co.*, 616 F.2d 1315, 1322 (5th Cir., 1980) *cert. den'd* ____ U.S. ____, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980). We have previously set out the elements of actual and implied agency under Texas law in our decision in *Valley View*.[3] Applying those legal principles

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[3] "Under Texas law, 'the relation of agency is a consensual relation existing between two persons, by virtue of which one of them is to act for and in behalf of the other and subject to his control.' *Sorenson* v. *Shupe Bros. Co.*, 517 S.W.2d 861, 864 (Tex.Civ.App., 1974) *quoting, Roper* v. *Compania De Perforaciones Y Servicio, S.A.*, 315 S.W.2d 30, 38 (Tex.Civ.App., 1958) and *Bertrand* v. *Mutual Motor Co.*, 38 S.W.2d 417, 418 (Tex.Civ.App., 1931). The relationship of agent and principal is created either by express or implied contract or by operation of law. *Green* v. *Hannon*, 369 S.W.2d 853, 856 (Tex.Civ.App., 1963). Thus, the existence of an agency relationship may be implied from the conduct of the parties. *Panhandle Steel Erectors, Inc.* v. *Whitlow*, 359 S.W.2d 146, 149 (Tex.Civ.App., 1962).

The Texas courts have adopted Restatement (Second) of Agency § 14K (1957):

> Agent or Supplier
>
> One who contracts to acquire property from a third person and convey it to another is the agent of the other *only if it is agreed that he is to act primarily for the benefit of the other and not for himself.* (Emphasis added).

See, American Employers Insurance v. *Kilgore*, 412 S.W.2d 67, 69 (Tex.Civ.App., 1967). More particularly, the court in *Kilgore* quoted from and applied the factors for determining the existence of agency set out in the comments to § 14K as follows:

> Factors indicating that the one who is to acquire property and transfer it to the other is selling to, and not acting as the agent for, the other are: (1) that he is to receive a fixed price for the property, irrespective of the price paid by him. This is the most important. (2) That he acts in his own name and

to the instant transactions, we conclude that there was no error in the trial court's conclusion that, with respect to the sales to Heller by Prochemco Cattle Partners and R&L, Heller was not acting as the agent of IBP.

We are further of the opinion that the Court's conclusion on the issue of conversion was not erroneous.

AFFIRMED.

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receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.

Restatement (Second) of Agency § 14K, Comment, at 75-76 (1957); *Kilgore*, 412 S.W.2d at 69." *Valley View Cattle Co.* v. *Iowa Beef Processors*, 548 F.2d at 1221.

PROOF OF SERVICE

Neil E. Holmen certifies that on December 15, 1981 he caused three copies of the foregoing Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit to be served upon counsel entitled to receipt thereof by depositing same in the United States mailbox located at One First National Plaza, Chicago, Illinois 60603, with firstclass postage prepaid, to Edward W. Rothe, Freeman, Rothe, Freeman & Salzman, One IBM Plaza, Suite 3200, Chicago, Illinois 60611 and Robert L. Templeton, Templeton & Garner, 1810 American National Bank Building, Amarillo, Texas 79101.

_____

Neil E. Holmen

SUBSCRIBED AND SWORN to before me this 15th day of December, 1981.

_____

Notary Public

My Commission Expires:

Opposition

No. 81-1117

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT D. RUFENACHT and ROBERT W. LEWIS d/b/a R&L CATTLE COMPANY,

Petitioners,

v.

IOWA BEEF PROCESSORS, INC.,

Respondent,

and

PROCHEMCO CATTLE PARTNERS, LTD., and PROCHEMCO, INC.,

Petitioners,

v.

IOWA BEEF PROCESSORS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Iowa Beef Processors, Inc. ("IBP") submits this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

Petitioners claimed that one James Louie Heller was IBP's actual or apparent agent in purchasing their cattle which he resold to IBP, and therefore Heller's failure to pay caused IBP to be liable to petitioners for the purchase price, even though IBP had already paid Heller in full. They also claimed IBP bought the cattle in bad faith under the Uniform Commercial Code and thus failed to receive good title.

After a bench trial, the District Court made extensive findings of fact and conclusions of law, finding in favor of IBP on all issues. The Court, rejecting the arguments that petitioners repeat here, held that earlier jury verdicts in other cases, not involving petitioners, which found that Heller acted as IBP's agent in the transactions there at issue, did not operate so as to "offensively" collaterally estop IBP from defending against petitioners' claims since those earlier verdicts dealt *only* with those other specific transactions. *Rufenacht v. Iowa Beef Processors, Inc.*, 492 F.Supp. 877 (N.D. Tex. 1980) (Petn.App. 1).

After full briefing and oral argument, the Fifth Circuit unanimously affirmed on all points, holding that the District Court's findings of fact were not clearly erroneous, that the District Court's legal conclusions based upon such facts were correct, and that the District Court's ruling on collateral estoppel was also sound. *Rufenacht v. Iowa Beef Processors, Inc.*, 656 F.2d 198 (5th Cir. 1981) (Petn.App. 2).

Petitioners now seek certiorari review by this Court solely on the offensive collateral estoppel issue and no

longer dispute the two lower courts' decisions on the facts and legal conclusions on the merits that, on the evidentiary record developed in this case, Heller was not IBP's agent in buying petitioners' cattle.

REASONS FOR DENYING THE WRIT

I.

NO ISSUE WORTHY OF CERTIORARI REVIEW HAS BEEN PRESENTED

Petitioners do not contend that the Fifth Circuit's decision in this case conflicts with any decision in another Circuit or with a decision by this Court, nor can they seriously argue that the proceedings below so far departed from the "accepted and usual course of judicial proceedings" that supervision by this Court is necessary. See this Court's Rule 17(1).

Indeed, all that petitioners claim is that the Fifth Circuit and District Court "misapplied" the rules for offensive collateral estoppel enunciated by *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and the "necessary inference" rule of collateral estoppel to the facts of this case. Even if petitioners had colorable grounds for these contentions, these issues do not come close to meriting certiorari, but instead are the type of specific factual and legal issues which must rest finally with the lower courts. However, as demonstrated below, petitioners' arguments are also groundless.

II.

PARKLANE WAS FAITHFULLY FOLLOWED

Contrary to petitioners' contentions, this case is a prime example of how the offensive collateral estoppel rule should be applied under *Parklane*.

This Court provided in *Parklane* that, because of substantial risks of unfairness to a defendant through application of the doctrine, offensive collateral estoppel would be handled by giving trial courts "broad discretion to determine when it should be applied * * *." *Id.*, at 331 (footnote omitted). That discretion was effectively exercised on three separate occasions by the trial court here, twice before and once after trial, and then was fully reviewed by the Court of Appeals, and each time the same answer was reached: The prior jury verdicts dealt only with the specific transactions at issue in those cases, the juries did not, by necessity, implicitly decide any issues applicable to this case, and it would be unfair to estop IBP from making its specific defense in this case.

III.

THE NECESSARY INFERENCE RULE WAS CORRECTLY APPLIED

Petitioners' central contention is that two earlier juries in other cases, though answering specific Rule 49 jury interrogatories solely addressing the transactions there in suit, implicitly decided that Heller was IBP's general agent in *all* his transactions.

For this Court to reverse the decisions of the two lower courts on this issue, it would have to become intimately familiar not only with the evidentiary record in

this case, but also in the two prior cases upon which petitioners premise collateral estoppel. This Court would then have to judge whether those earlier juries implicitly decided a broad question which they were not called upon to decide, rather than simply answering the specific jury interrogatories submitted to them. This Court would then have to discard the contrary decisions of the trial court that actually heard the evidence and decided the facts, and of the Court of Appeals that also ruled on the sufficiency of the evidence supporting the verdicts in the two earlier cases.

In the end, however, we submit that this Court would actually rule the same way that the two lower courts decided, because the application of the "necessary inference" rule is really not that difficult here. Contrary to petitioners' suggestion, the records in these cases were not limited to evidence showing the general manner of doing business between Heller and IBP. Rather, much of the evidence went to the manner in which Heller purchased the cattle in question from the particular plaintiffs and his prior dealings with each plaintiff or the plaintiff's feedyard agent. Opinions were then adduced from the plaintiffs and experts presented by both sides concerning whether Heller's manner of dealing with the plaintiff was that of an agent buyer or an independent dealer. The specific sales documentation was also important in each case.

Therefore, the juries could have, and undoubtedly did, use this specific evidence to answer the jury interrogatories, particularly since those interrogatories were expressly limited in each case to the transactions in suit. Certainly, petitioners' suggestion to the contrary

has no basis in the record and amounts to nothing more than speculative mind-reading.[1]

IV.

OFFENSIVE COLLATERAL ESTOPPEL WOULD BE UNFAIR TO IBP

This Court in *Parklane* took pains to avoid unfair application of offensive collateral estoppel, and both of the lower courts here ruled that invoking the doctrine under the present circumstances would be unfair to IBP.

This conclusion is irrebuttable, since petitioners did not file their cases until *after* the jury verdict in the *first* case (*Valley View*) upon which they would base collateral estoppel had been entered, thus adopting the "wait and see" attitude ruled out as unfair by *Parklane*. 439 U.S. at 330. Since the District Court had unequivocally rejected collateral estoppel prior to trial in the *second* case (*Lubbock Feed Lots*) which petitioners would use to estop IBP (and the Fifth Circuit had decided not to review the decision by interlocutory appeal), that case was tried solely with respect to the specific transactions involved there and IBP did *not* present the evidence it had which rebutted these petitioners' claims

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[1] Indeed, the differing results in the three cases may well reflect the evidentiary distinctions. This Court should also know that on November 20, 1981, a jury entered a verdict in favor of IBP in the last of these "Heller" cases which itself involved 11 cattle owners at 6 different feedyards. Again, the jury was asked to decide whether or not Heller was IBP's agent in the particular transactions in suit, not generally. *Brumley Estate, et al. v. Iowa Beef Processors, Inc.*, Civil Action No. 5-76-8 (N.D. Tex., Lubbock Div.). The District Court in that case again rejected collateral estoppel prior to trial.

that Heller was IBP's agent when he bought their cattle. It would be egregiously unfair to tell IBP now that petitioners' claims, pending in a separate suit, had actually been submitted to the *Lubbock Feed Lots* jury *sub silentio* and without any evidence whatsoever addressed to the sales of petitioners' own cattle to Heller.

What petitioners are actually attempting is a free ride on the coattails of other litigants and avoiding their own particular vulnerability before the fact finder. (For example, petitioner Rufenacht was closely associated with Heller in commodities trading, which actually caused Heller's financial downfall, and petitioner Prochemco's feedyard manager who actually sold the cattle in question to Heller testified that he knew full well at the time that Heller was an independent dealer, not IBP's agent.)[2]

Petitioners suffered no prejudice from having their own day in court (other than losing on the merits). They were not parties to the earlier cases and thus did not incur duplicative legal expenses. They presented all their evidence to the trial court and did not complain on appeal about any of that court's evidentiary rulings. Both of the lower courts evaluated all the evidence submitted and ruled for IBP.

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[2] Early in this litigation, the District Court refused to consolidate the *Lubbock Feed Lots*, *R&L*, *Prochemco*, and *Brumley Estate* cases for one trial because it found that each case raised different, specific factual questions. On appeal, petitioners have not challenged that ruling, which is fatal in itself to their collateral estoppel contentions.

CONCLUSION

These petitioners had their day in court, but failed to prove their case. We cannot know what was in the minds of the jurors in the earlier cases other than what they expressed in their specific, limited findings, but we do know, because of the trial court's extensive findings and legal opinion here and the Court of Appeals' affirmance, what the evidence showed in this case. Petitioners have offered this Court no basis for disturbing that result.

Therefore, IBP asks that the petition be denied.

Respectfully submitted,

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DATED: December 29, 1981